

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

CHRISTINA BOWNE,

Plaintiff,

v.

KS-VAP, PC d/b/a KOOL SMILES,

Case No.: 2:10-cv-327

KOOL SMILES VAN, PC

and

NCDR, L.L.C.,

Defendants.

**PLAINTIFF’S REPLY BRIEF TO
DEFENDANTS’ MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFF’S MOTION TO REMAND**

COMES NOW the plaintiff, by counsel, and in reply to the defendants’ response to Plaintiff’s Motion to Remand, respectfully replies as follows:

Defendants KS-VAP, PC d/b/a Kool Smiles, and Kool Smiles VAN, PC – both Virginia corporations, citizens of the same state as the Plaintiff – do indeed act in consort with Defendant NCDR, L.L.C. as one entity engaged in the business of dentistry, as alleged in Plaintiff’s Brief in Support, which fact is not denied by the defendants. Due to the manner in which they act in consort with each other (*see, Complaint* ¶¶ 1-19 at 2-6), Ms. Bowne brings her claims jointly and severally against all of the defendants (*see, Complaint* at 2 and 6). Because the claims against

the non-diverse defendants cannot be deemed to be “wholly insubstantial and frivolous,” their joinder as defendants cannot be considered as fraudulent. In re Briscoe, 448 F.3d 201, 216 (3d Cir. 2006). “Joinder is fraudulent if there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.” Id.

The fact is, but for Ms. Bowne’s damages consisting “merely” of her employment interests, she in her Complaint would have brought an additional count for violation of Virginia Code §§ 18.2-499 and -500: civil conspiracy among Defendants KS-VAP, PC d/b/a Kool Smiles, Kool Smiles VAN, PC and NCDR, L.L.C., to damage Ms. Bowne. *See, Mansfield v. Anesthesia Associates*, ____ F. Supp. 3d ____, 2008 U.S. Dist. LEXIS 34732 (E.D. Va. 2008) (damage to one’s employment interests is personal in nature, not of one’s “business interests”, and thus is outside the scope of The Virginia Civil Conspiracy Statute).

Here, all three entities are pieces of the same corporate pie, against which this plaintiff has full intention of prosecuting her claims and from whom she has full intention of collecting her damages.

Moreover, Defendant NCDR, L.L.C., is not a “staffing agency” and analogies by the defendants thereto are misplaced. The only “clients” to whom NCDR furnishes services are Kool Smiles dentist offices. This is part of the over-arching business model of the brand known as “Kool Smiles.” A cursory review of the internet shows this to be the case. First, the investment bank and holding company which owns NCDR, Friedman, Fleisher, & Lowe, lists Kool Smiles’ corporate website as the website for NCDR, L.L.C., and describes Kool Smiles as being the economic vehicle by which NCDR is to grow. *See, Exhibit A.* NCDR has been

referred to as “the practice management firm for Kool Smiles” by its information technology vendor. *See, Exhibit B.* At the Janaf Shopping Center in Norfolk, NCDR does business as “Kool Smiles.” *See, Exhibit C.* At industry conferences, corporate executives hold themselves out as being officers of “NCDR, L.L.C./Kool Smiles,” as seen recently in the November 2009 Medicaid Health Plans of America Annual Meeting Program Book, the cover and pages 3, 39, and 47 of which are attached as **Exhibit D.** These are just a few examples.

Moreover, Defendants seek impermissibly to shift the burden of analysis regarding their allegation of fraudulent joinder: they place the cart (remand) before the horse (fraudulent joinder). The analysis here in this motion to remand is not whether Plaintiff has as a matter of law failed to state a claim against the two Virginia citizen defendants herein, KS-VAP, PC, d/b/a Kool Smiles and Kool Smiles VAN, PC. Rather, the analysis is whether these two defendants have been fraudulently joined, which they have not. In the defendants’ brief, they failed to cite any authority supporting their blanket allegation that the Virginia defendants herein were fraudulently joined in order to defeat diversity jurisdiction. Instead, they seek to shift the burden by arguing that Plaintiff did not cite “any authority which establishes [the defendants’ acting in consort with each other] as a valid reason for remand.” Defendants’ Memo in Opposition, at 3. None of the cases cited by the defendants involve either diversity jurisdiction or fraudulent joinder. Instead, they discuss by whom an employee is employed for purposes of federal civil rights claims. *See, West v. MCI Worldcom, Inc.*, 205 F. Supp. 2d 531 (E.D. Va. 2002); Alford v. Martin & Gass, Inc., No. 1:08cv595, 2009 U.S. Dist. LEXIS 15110 (E.D. Va. Feb. 25, 2009).

Neither KS-VAP, PC d/b/a Kool Smiles, nor Kool Smiles VAN, PC, have been fraudulently joined as parties-defendant herein. Because there is not complete diversity of

citizenship between the parties, this Court lacks jurisdiction over this matter, and it must be remanded to the Circuit Court for the City of Portsmouth. Therefore, Plaintiff respectfully prays that this honorable court grant her Motion to Remand, and assess against the defendants her attorney's fees and costs.

Respectfully submitted,

CHRISTINA BOWNE

By: /s/ David A. Buzard
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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2010, the foregoing Plaintiff's Reply Brief to Defendants' Memorandum of Law in Opposition to Plaintiff's Motion to Remand will be electronically filed with the Clerk of the Court using this CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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